STATE OF MICHIGAN

COURT OF APPEALS

DOCK FOUNDRY COMPANY, d/b/a METAL TECHNOLOGIES, INC.,	UNPUBLISHED January 9, 2014
Appellant,	
v	No. 305297 MPSC
MICHIGAN PUBLIC SERVICE COMMISSION,	LC No. 00-016531
Appellee,	
and	
INDIANA MICHIGAN POWER COMPANY,	
Petitioner-Appellee.	

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Appellant Dock Foundry Company (Dock Foundry) appeals as of right from a Michigan Public Service Commission (PSC) order approving a settlement agreement between Indiana Michigan Power Company (Indiana Michigan) and the PSC Staff. This case was held in abeyance, see *In re Application of Indiana Michigan Power Co to Increase Rates*, unpublished order of the Court of Appeals, entered May 2, 2013 (Docket No. 305297), pending the Supreme Court's decision on the application for leave to appeal *In re Application of the Detroit Edison Company to Increase Rates*, 297 Mich App 377; 823 NW2d 433 (2012). The Supreme Court having issued an order affirming the result in this Court's opinion, see *In re Application of the Detroit Edison Company to Increase Rates*, __ Mich __ (2013), we now affirm.

On January 27, 2010, Indiana Michigan filed an application for approval of an increase in rates for retail electric service in the annual amount of $62.5 million. Pursuant to MCL 460.6a(1), Indiana Michigan was entitled to impose a self-implemented interim rate if the PSC did not act on its application within 180 days or issue an order preventing or delaying self-implementation for good cause. On June 25, 2010, Indiana Michigan filed a proposed interim rate surcharge rider tariff that reflected a rate increase of $44.3 million annually. In accord with a July 13, 2010 PSC order, Indiana Michigan implemented the $44.3 million annual increase in its retail electric rates, effective July 26, 2010, through an interim rate surcharge rider applied to existing tariffs and rates. Ultimately, the PSC approved a settlement agreement on October 14,

2010 resulting in a final annual rate increase of $35.707 million, which was less than the self-implemented annual increase. As a result, Indiana Michigan was required by § 460.6a(1) to issue a refund.

Indiana Michigan determined that the total refund amount was $2,675,213. It proposed that this amount be allocated "among the rate schedule classes due a refund based on their pro rata share of the total revenue collected through the interim rate surcharge rider billed July 26, 2010 through the November 2010 billing month." Pertinent to this case, it proposed that the "LARGE POWER" subtransmission voltage customers (LP-SUB) would receive a refund equal to 2.1973 cents multiplied by the kWh usage for a total of $315,864 during the refund month. It rejected the customer specific approach, noting that the pro rata approach had been adopted in other utility cases and claiming that the customer specific approach would be "unworkable because of the administrative challenge it creates."

Following an audit and analysis by the PSC staff, Indiana Michigan and the PSC staff reached a settlement, which the PSC approved. It called for a refund in the amount of $3,076,872, plus interest, to be distributed "on an individual rate schedule basis," effective for the July 2011 billing month. An exhibit attached to the Order Approving Settlement Agreement shows that the LP-SUB customers would get nothing. Dock Foundry claimed that it purchased a substation from Indiana Michigan on November 29, 2010 and that it moved from Tariff 358 (Quantity Power) to Tariff 308 (Large Power) on December 1, 2010. Accordingly, while it paid the interim rate, it did not qualify for a refund.

Preliminarily, Indiana Michigan challenges this Court's jurisdiction on grounds that Dock Foundry, who was not a party in the proceeding below, is not a "party in interest." Dock Foundry claims an appeal of right pursuant to MCL 462.26. Subsection (1) of that statute provides in pertinent part:

> [A]ny common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals."

Union Carbide Corp v Pub Serv Comm, 153 Mich App 217, 227; 395 NW2d 292 (1986), indicates that appellant would qualify as a party in interest. Moreover, "party in interest" appears to mean something broader than just a named party to the PSC case or the words "in interest" would be rendered nugatory or surplusage. Thus, we conclude that this Court has jurisdiction. Apart from this statute, MCR 7.203(A) provides that this Court has jurisdiction of an appeal of right filed by an "aggrieved party," which has been determined to mean a party that has "suffered a concrete and particularized injury . . . ." *Martin v Sec'y of State*, 280 Mich 417, 424-425; 760 NW2d 726 (2008), quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-291; 715 NW2d 846 (2006). Appellant, who will not receive a refund given the refund methodology approved in this case, will suffer such an injury.

Indiana Michigan also argues that this appeal is moot because the order was not stayed, the refund was made during the July 2011 billing cycle, and it could not be required to issue

Dock Foundry a refund because this would be prohibited retroactive ratemaking or, because Indiana Michigan could not recover the rate, confiscatory. "[T]he essential principle of the rule against retroactive ratemaking is that when the estimates [of costs on which rates are based] prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that the MPSC can take is to prospectively revise rates in an effort to set more appropriate ones." *Attorney General v Pub Serv Comm*, 262 Mich App 649, 656; 686 NW2d 804 (2004) (alteration in original), quoting *Detroit Edison Co v Public Service Comm*, 416 Mich 510, 523; 331 NW2d 159 (1982). What is prohibited is readjusting rates charged in a prior year, not orders affecting future rates. *Attorney General v Pub Serv Comm*, 262 Mich App at 657-658. If it were determined that Indiana Michigan was responsible for issuing a refund to Dock Foundry, the expense could presumably be reflected in a future rate. Thus, it does not appear that a refund would involve retroactive ratemaking or be confiscatory.

Dock Foundry argues that under § 460.6a(1) primary customers (such as Dock Foundry) are entitled to a refund based on their pro rata share of revenue collected through the increase, meaning that there must be an exact calculation for each individual primary customer based on actual historic usage and payments. MCL 460.6a(1) provides in pertinent part:

> . . . . If a utility implements increased rates or charges under this subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. *The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase*, and among secondary and residential customers in a manner to be determined by the commission. [Emphasis added].

This Court found that the statute was ambiguous and could "be read as requiring that *all* of the primary customers together be given a refund based on *all* of the primary customers' pro rata share of the total revenue collected," 297 Mich App at 386 (emphasis in original), and that there were cogent reasons supporting this interpretation of the PSC. *In re Application of the Detroit Edison Company to Increase Rates*, 297 Mich App at 384-386. See *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935). The Supreme Court concluded that this Court's finding of ambiguity was error, but affirmed this Court's conclusion that the PSC "was not obligated by MCL 460.6a(1) to order a refund based on the actual amount that each customer overpaid, and the PSC did not abuse its discretion in approving the refund methodology at issue." *In re Application of the Detroit Edison Company to Increase Rates*, __ Mich __. Given this result, we must hold that the PSC did not err in approving the settlement between Indiana Power and the PSC staff since the same refund methodology was used.

Affirmed.

/s/ Donald S. Owens
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher